STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2002
v	No. 227117 Allegan Circuit Court
MICHAEL DENNIS BATEY, Defendant-Appellant.	LC No. 99-011109-FC

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

A jury convicted defendant Michael Batey of first-degree criminal sexual conduct (CSC I)[1] for engaging in oral sex with his nephew, MA. The trial court sentenced Batey to fifteen to forty-five years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

According to MA, Batey began to abuse him sexually was when he was fourteen or fifteen years old. On that first occasion, MA said, he and Batey were in the field behind Batey's house picking berries in the bushes while MA's brother, JA, was at the house. Batey reportedly asked if he could see MA's penis. MA first said no, but after Batey persisted, he said yes. MA claimed that he saw then that Batey had his penis out of his pants, JA was standing there, and Batey started to masturbate in front of him. The next day, MA said, Batey told him that he wanted to fellate him. MA initially said no, but eventually relented after Batey reassured him that this sort of behavior between uncles and nephews was normal. After Batey performed fellatio on MA, he asked MA if MA would perform the same act on him. MA again resisted the idea, but finally agreed to perform the act after additional persuasion from Batey. MA testified that this type of sexual activity went on every time he went over to Batey's house for about a year, and that he had oral sex with Batey approximately twenty-five times.

After the prosecutor charged Batey with CSC I and the case went to trial, JA testified that he started drinking when he was about thirteen and that Batey gave him alcohol every time he went to Batey's house. "He would get me all plastered and I'd wake up and my pants would be down, you know, it was scary." JA stated that Batey gave him cigarettes and money and told

[1] MCL 750.520b(1)(b)(ii).

him, "don't tell anybody." JA said that he would protest this conduct sometimes, when he was not drunk, but then he would finally accede to it. As JA said, "I was heterosexual and I was getting confused . . . thought I was gay . . . confused, say I'm gay, then change my mind and say I'm not gay." JA claimed that Batey manipulated him, he had "mind play over me." JA also said that he had oral sex with Batey so many times that he could not recall the exact number of instances. He also claimed to have had anal sex with Batey several times.

JA also recalled seeing Batey molest MA. For instance, JA recalled one occasion when he was standing in front of the doorway at Batey's house, he could see into the bedroom when Batey was performing oral sex on MA. JA said that he became confused and did not know whether to tell anyone, nor did he know if anyone would believe him. According to JA, the next month he asked MA what he would say to their mother if JA told her what he saw. When MA was admitted to Pine Rest, a residential rehabilitation program, JA told his parents that he knew why MA had a nervous breakdown. When they asked him why, "I told them everything, I just opened up." He told them about "[a]ll the sexual molestation, everything with me and [MA] and Mike [Batey]."

Robin Zollar, a psychotherapist who specializes in sexual assault and sexual abuse, also testified for the prosecution at trial. She said that child victims of sexual assault normally do not tell anyone immediately. According to Zollar, there is "delay in disclosure" because of embarrassment, pressure, secrecy or coercion. In her view, it was not uncommon to find mental health problems in children who are victims of sexual abuse because of the betrayal of trust. Nor would she find it strange if a child victim recanted any accusations of molestation, denying that it occurred.

Several of Batey's friends and former lovers testified on his behalf, either to impeach the credibility of MA and JA or to provide alibi testimony. Batey did not testify.

II. Juror Bias

A. Standard of Review

Batey first argues that the trial court erred when it denied his motion for a new trial after it was discovered that one of the jurors failed to disclose during voir dire that she knew MA's step-father, who was a witness at trial. He takes issue with the way the trial court conducted the evidentiary hearing on this matter, as well as the trial court's conclusion that he was not entitled to a new trial. We review the trial court's decision denying defendant's motion for a new trial for an abuse of discretion.[2]

B. Past Acquaintance

We reject Batey's related argument that the trial court abused its discretion by questioning the witnesses itself and limiting the number of witnesses who could testify at the evidentiary hearing on this juror bias matter. In general, a court has the discretion to limit the

[2] *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

scope of questions and "guard against fishing expeditions."[3] Although the trial court conducted the examination of the witnesses at the evidentiary hearing, it permitted the parties to submit questions that they wanted the trial court to ask. We are satisfied from our review of the record that the questions the trial court asked probed deeply enough for it to determine from a sufficient factual basis the extent to which the juror's past knowledge of the witness affected her ability to sit as a juror and remain fair and impartial. Batey has failed to demonstrate that the trial court's method of questioning was either an abuse of discretion or prejudiced his rights.

Similarly, we conclude that the trial court did not abuse its discretion in limiting the number of witnesses at the evidentiary hearing. Unlike the situation in *Vandette v Toffolo*,[4] the trial court in this case permitted an evidentiary hearing and allowed Batey to call pertinent witnesses. Batey has not identified any additional witnesses he wanted to call, nor the substance of any testimony they might have provided. Thus, he has not demonstrated that the trial court's decision constituted an abuse of discretion.

Furthermore, the trial court did not abuse its discretion in its substantive decision to deny Batey's motion for a new trial. The juror testified that she recognized the witness as someone she knew from her town several years earlier, but that they were never friends. The juror stated that the relationship was never disclosed during deliberations, and she did not believe that it had any affect on her decision. The record, including this testimony, failed to demonstrate that Batey suffered actual prejudice or that the juror would have been excusable for cause had the information been disclosed during voir dire. Therefore, Batey was not entitled to a new trial on this ground.[5]

III. MA And JA Interview Tapes

A. Standard Of Review

Batey contends that the trial court erred in denying his motion to dismiss the case against him because law enforcement destroyed the tape recordings Michigan State Police Trooper Joseph Jones made of his interviews with MA and JA. We review the trial court's decision for an abuse of discretion.[6]

B. Police Destruction

According to Trooper Jones, he tape-recorded his interviews with MA and JA to ensure that he completed his subsequent report accurately. He assured MA and JA that he would erase the tape after completing his report, which he did. Trooper Jones asserted that there is no Michigan State Police policy about when to tape-record a statement, or when to preserve any recorded statements. The key question here, however, is whether the tapes were exculpatory or

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[3] See *People v Lucas (On Remand)*, 193 Mich App 298, 303; 484 NW2d 685 (1992).

[4] *Vandette v Toffolo*, 29 Mich App 185, 189; 185 NW2d 130 (1970).

[5] See *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998).

[6] See *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001).

intentionally destroyed in bad faith.[7] The trial court concluded, and we agree, that Batey did not provide any such evidence. Additionally, because there was no showing of bad faith, the trial court did not err in refusing to give an adverse inference instruction.[8]

IV. Evidentiary Issues

A. Standard Of Review

Batey argues that the trial court denied him a fair trial by prohibiting defense counsel from commenting during closing argument on evidence of sexual activity between MA and JA. He also challenges several other evidentiary rulings the trial court made. We review these issues to determine whether the trial court abused its discretion.[9]

B. Sexual Activity

Before trial, the trial court ruled that evidence of sexual activity between MA and JA could not be admitted at trial. Nonetheless, the jury received in evidence a letter that MA wrote to Batey and Batey's taped statement, both of which referred to sexual activity between MA and JA. During closing argument, the trial court precluded defense counsel from commenting on this evidence.

It is well-established that, during closing argument, the attorneys may comment on the evidence and reasonable inferences arising from the evidence.[10] Additionally, defendants have a constitutional right to present a defense, which logic dictates requires making arguments to the jury.[11] Despite the trial court's earlier ruling, the jury actually acquired evidence referring to sexual activity between MA and JA. The reason the trial court prohibited defense counsel from commenting on this evidence was its belief that the sexual activity between the brothers had any no "ill effects." However, MA had a nervous breakdown and the prosecutor suggested to the jurors that they infer that sexual activity between Batey and MA caused the breakdown. Defense counsel should have been equally free to argue that sexual activity between MA and JA caused the breakdown.[12] Further, there is no legal support for the trial court's rationale that, because the evidence came in "for expediency sake," it changed Batey's right to comment on the evidence. Once the evidence was admitted, defense counsel should have been permitted to make arguments concerning the evidence and the inferences the jury should draw from the evidence.

Nevertheless, the trial court's error does not require reversal. The jury was aware from the evidence that there was sexual activity between MA and JA. During closing argument, defense counsel told the jury that, in a letter to Batey, MA disclosed that JA had sexually

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[7] See *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

[8] See *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

[9] See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[10] See *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

[11] See *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002).

[12] See *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

assaulted him. Defense counsel urged the jury to read the letter carefully. Thus, while defense counsel did not have an opportunity to frame the arguments as might have been desired, the jury was still aware of the defense theory. Under these circumstances, it does not affirmatively appear that it is more probable than not that the error was outcome determinative.[13]

C. Satanism

Nor did the trial court abuse its discretion by precluding Batey from questioning JA about his belief in Satanism, or from introducing evidence of JA's books on Satanism. The trial court correctly determined that the evidence was not relevant to any issue that was material at trial, and that any marginally probative value the evidence would have would be substantially outweighed by its prejudicial effect.[14]

D. Photographs

Batey sought to admit into evidence photographs that purportedly demonstrated that it was impossible for JA to see into Batey's bedroom from the place where he was standing when he claimed to have seen Batey molesting MA. Evidently, he had these photographs taken at a late date, because defense counsel did not receive the photographs until after the trial had commenced, and argued that they should be admissible at that late time because JA had changed his testimony at trial from his testimony at the preliminary examination. As defense counsel put it, the photographs should be admissible as if they were rebuttal evidence to surprise testimony.

The trial court, however, determined that JA's trial testimony was not materially different from his testimony at the preliminary examination on this subject and, therefore, the photographs were not responsive to surprise testimony at trial. Additionally, the trial court found that the photographs violated the discovery order and would be misleading because they did not "show all of the possible perspectives that the witness would have been able to observe." We see no error in the trial court's reasoning.[15] We add that other witness testimony on behalf of Batey informed the jury that it was not possible to see into Batey's bedroom from every angle in the hallway. Furthermore, though Batey claims that MCR 6.201(H) required these photographs to be admitted, the argument is meritless because the photographs were taken, not "discovered," and the trial court ruled that the photographs violated its discovery order, not the court rules governing discovery.

E. Psychological Records

Batey argues that the trial court abused its discretion by denying him access to MA's and JA's privileged psychological records. The trial court reviewed the records at issue in chambers. Following this review, the trial court determined that the privileged psychological reports did not contain any relevant, helpful, or admissible evidence. We are not persuaded that Batey has

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[13] *Lukity, supra* at 495.

[14] See *People v Mills*, 450 Mich 61, 66-68, 75-76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995).

[15] See *Lukity, supra* at 488.

demonstrated a reasonable probability that the privileged records were material to his defense.[16] Thus, the trial court did not abuse its discretion.

V. Prosecutorial Misconduct

Batey argues that the prosecutor's misconduct during closing and rebuttal arguments denied him a fair trial. Batey failed to object to all but one of the alleged instances of misconduct. Whether viewed under the de novo[17] standard required for the single preserved instance of alleged misconduct or the plain error[18] standard applicable to the other instances Batey brings to our attention, the result is the same: Batey has not demonstrated that the prosecutor's comments were likely to have had any negative effect on the jury. With respect to the comment that drew his objection at trial, the trial court took prompt action to prevent prejudice to him. None of the other comments affected Batey's substantial rights. Singularly or collectively, these comments did not deny Batey a fair and impartial trial.[19]

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

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[16] See *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998), citing *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994) and MCR 6.201(C).

[17] See *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[18] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[19] See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).